

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

MADISON BOSCH CONSTRUCTION, LLC

and

Cases 10-CA-34182
10-CA-34184
10-CA-34185

SOUTHEASTERN CARPENTERS REGIONAL
COUNCIL

Ellen K. Hampton, Esq., for the General Counsel.
Mr. Jimmy Gibbs for the Charging Party.

BENCH DECISION

Statement of the Case

George Carson II, Administrative Law Judge: This case was tried in Savannah, Georgia, on June 16, 2003. The charges in all three of the above captioned cases were filed on January 10, 2003, and all three charges were amended on March 27, 2003. The complaint issued on March 28, 2003. The complaint alleges that the Respondent, Madison Bosch Construction, LLC, threatened, interrogated, and coerced employees in violation of Section 8(a)(1) of the National Labor Relations Act and discharged two employees and failed and refused to hire one employee applicant because of their union activities in violation of Section 8(a)(3) of the Act. Respondent's answer denied any violation of the Act. Counsel for the General Counsel requested that I issue a Bench Decision. At the conclusion of the hearing, I did so.

The Respondent did not appear at the hearing. The Respondent received the Complaint and Notice of Hearing that set this hearing for 10 a.m. on June 16, 2003, at a place to be designated in Savannah, Georgia. On May 23, 2003, the Region served, by regular mail, a separate Notice of Hearing.¹ As stated in my Bench Decision, although there is no evidence that the Respondent was served with that Notice, the critical issue is whether the Respondent had "actual notice" of the location of the hearing. See *Buckeye Plastic Molding*, 299 NLRB 1053 (1990). The record conclusively establishes that the Respondent did have such notice. On May 30, the Respondent's owner and president was served with a subpoena ad testificandum and the Company was served with a subpoena duces tecum by certified mail. Receipts were signed for both subpoenas. Each subpoena states that the location at which appearance is directed is Courtroom I at the Chatham County Courthouse. No person appeared in response to the subpoenas. The Respondent had "actual notice" of the specific location of the hearing.

I certify the accuracy of the portion of the transcript that sets out my decision, attached hereto as Appendix A, page 75, line 20, through page 81, line 8.²

¹ It would appear that service by regular mail would be appropriate if that Notice had issued as an Order Setting Place of Hearing. See Sec. 102.113(d) of the Board's Rules and Regulations.

² Appendix A has been corrected. The corrections are reflected in Appendix C.

My decision does not separately state the conclusions of law that are implicit in my decision. Lest there be any question in that regard, I set them out herewith, together with my recommended remedy and order.

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Conclusions of Law

1. The Respondent, Madison Bosch Construction, LLC, is engaged in the construction industry in Savannah, Georgia. The Respondent annually performs services valued in excess of \$50,000 in states other than the State of Georgia. I find and conclude that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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2. I find and conclude that Southeastern Carpenters Regional Council, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

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3. By threatening employees with legal action in retaliation for engaging in activity protected by Section 7 of the Act, interrogating employees regarding their participation in union activities and protected concerted activities, and by conditioning the reinstatement of employees that it had unlawfully discharged upon disavowal of their protected Section 7 activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

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4. By discharging John Worthy and Renard Burns because of their union and protected concerted activities, and by refusing to hire employee-applicant Lester N. Sheppard because of his affiliation with the Union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

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Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

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The Respondent having discriminatorily discharged John Worthy and Renard Burns, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from December 14, 2002, to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

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The Respondent having unlawfully refused to hire Lester N. Sheppard on December 17, 2002, it must offer him reinstatement and make him whole for any loss of earnings or other benefits he may have suffered as a result of the discrimination practiced against him from December 17, 2002, the date that he would have commenced working for the Respondent, to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

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I shall leave for compliance the determination of whether, if the projects upon which the Respondent was working in December 2002 have been completed, the discriminatees would have ceased working or whether the Respondent would have nondiscriminatorily assigned the discriminatees to other jobs. *Dean General Contractors*, 285 NLRB 573 (1987).

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If the work at the jobsites involved in this proceeding has been completed, Respondent must mail a copy of the Notice to all former employees who were working for the Respondent on December 6, 2002, and all former employees who worked for the Respondent at any time thereafter. *Jo-Del, Inc.*, 326 NLRB 296 at fn. 4 (1998).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The Respondent, Madison Bosch Construction, LLC, Savannah, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Refusing to hire employee applicants because they are members of Carpenters Local 256, any local union affiliated with Southeastern Carpenters Regional Council, or any other labor organization.

(b) Discharging employees because of their union activities and protected concerted activities.

(c) Threatening employees with legal action in retaliation for engaging in activities protected by Section 7 of the Act.

(d) Interrogating employees regarding their participation in union activities and protected concerted activities.

(e) Conditioning the reinstatement of employees upon disavowal of their protected Section 7 activities.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days from the date of this Order, offer John Worthy and Renard Burns full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Within 14 days from the date of this Order, offer Lester N. Sheppard reinstatement to the position for which he applied, or, if that position no longer exist, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges to which he would have been entitled if the Respondent had not discriminated against him.

³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Make whole John Worthy, Renard Burns, and Lester N. Sheppard for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges and refusal to hire, and within 3 days thereafter, notify John Worthy, Renard Burns, and Lester N. Sheppard in writing that this has been done and that the discharges and refusal to hire will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to determine the amount of backpay due under the terms of this Order.

(f) Mail to all former employees employed by the Respondent at any time on or after December 6, 2002, and post at its office and jobsites in and around Savannah, Georgia, copies of the attached notice marked “Appendix B.”⁴ Such notice shall be mailed to the last known address of each former employee. Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be mailed within 14 days after service by the Region and shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. July 9, 2003

George Carson II
Administrative Law Judge

⁴ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading “POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD” shall read “POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.”

APPENDIX A
BENCH DECISION

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20 Pursuant to the Board's Rules and Regulations Section 102.35(10),
21 administrative law judges have been granted the authority to
22 issue bench decisions. Consistent with that authority, I
23 do issue this bench decision, and consistent with Rules and
24 Regulations Section 102.45, I will upon the receipt of the transcript
25 and exhibits certify the accuracy of the relevant pages of the

76

1 transcript that include my decision.

2 That certification will also contain the standard
3 introduction to an administrative law judge's decision, formal
4 findings of fact and appropriate order and notice.

5 With regard to the issues in this
6 case, the Respondent's answer admits jurisdiction but does not
7 admit its status as an employer. The facts admitted relative
8 to jurisdiction establish that the Respondent is a statutory
9 employer.

10 The answer also does not admit the Union's status as a
11 labor organization. The testimony of Organizer Jimmy Gibbs
12 establishes that the Union is an organization engaged in collective
13 bargaining with employers regarding wages, hours, working
14 conditions and other terms and conditions of employment and that
15 employees are permitted to and do participate. I find that
16 the Union is indeed a labor organization.

17 The complaint and notice of hearing

18 was received by the Respondent as confirmed by a signed certified receipt.

19 Receipt is further confirmed by the Respondent's filing of

20 an answer. That complaint states the date, the time of

21 hearing, and that a hearing will be held in Savannah, Georgia,

22 "at a place to be later designated." There is no proof of

23 receipt by the Respondent of the Notice setting the place of

24 hearing at this location, Courtroom I, on the fourth floor of the

25 Chatham County Judicial Complex; however, General Counsel's 6

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1 and 7 establish the service and receipt of a subpoena ad

2 testificandum and a subpoena

3 duces tecum, upon the Respondent. The signed receipts

4 confirm the Respondent's awareness of the location of this

5 proceeding. Counsel's representation of communication with

6 Respondent further confirms that. Hence, the absence of proof

7 of receipt of the document reflecting the location

8 becomes immaterial in view of the uncontradicted evidence that

9 subpoenas, to which the Respondent has not responded,

10 were received.

11 Turning to the substantive provisions of the complaint,

12 whether Buster Godbee was a supervisor, to my mind, is

13 immaterial insofar as his statements

14 clearly establish that he was an agent.

15 Paragraph 7 alleges that President Roger Van den Bosch

16 threatened employees with unspecified reprisals, including

17 lawsuits, if they engaged or continued to engage in union or

18 other protected activity. Employee John Worthy's testimony is that
19 after the beginning of conversation where Van den Bosch noted that he had
5 20 heard about the union authorization cards, he stated his opinion that what Mr.
21 Worthy was doing was wrong, and then proceeded to say that he
10 22 could sue him. Hence, there's clearly a threat of lawsuit
23 in retaliation for Mr. Worthy's engaging in protected activity in
24 violation of Section 8(a)(1).

15 25 I do not find the reference to unspecified reprisals

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20 1 established, but certainly the threat of lawsuit constitutes
2 an 8(a)(1) violation.

25 3 The testimony, which I shall not specifically relate in
4 detail, confirms that Mr. Van den Bosch was aware that Mr.
5 Gibbs was an organizer for the Union. His statements on the
30 6 morning of December the 14th in which he railed against the
7 Union, and asked who had signed the paper that Mr. Gibbs had
8 circulated the day before, are persuasive circumstantial
35 9 evidence that he was aware, quite possibly from Frank, who is
10 not otherwise identified in the record,
40 11 that the Union, in fact, had again appeared on the
12 scene at a jobsite.

45 13 His statements at the Armstrong Atlantic State
14 University jobsite, in which he asked which employees had
15 signed the document, clearly constituted coercive
16 interrogation, in that immediately upon learning who had done
17 so, he moved those employees from the group, and informed them that he

18 was going to have to let them go. Even if
19
5 20 his action was not motivated by their union activities,
21 certainly the fact that there was a list involved, and that
10 22 more than one name, i.e., two people at least raised their
23 hands and were separated, establishes that we are dealing
24 with protected concerted activity, even if there was no
15 25 evidence of union activity. But as I've indicated, we do have

79

20 1 evidence of union activity, because of the remarks that were
2 contemporaneously made by Mr. Van den Bosch, Jr. reflecting his
3 antipathy towards the Union.

25 4 Applying the Wright Line analysis, obviously the fact that Mr.
5 Worthy and alleged discriminatee Renard Burns identified
30 6 themselves as having signed the document, confirms first,
7 their engagement in that activity, and second, the Respondent's
8 knowledge of that activity. The third prong, of course, being
35 9 animus, which is amply established both by the circumstantial
10 evidence relating to the terminations on the 14th, and
40 11 specifically by Mr. Van den Bosch, Jr.'s statement to Mr.
12 Worthy on December the 6th when he threatened him with
13 being sued for engaging in activity protected by the Act.

45 14 The termination
15 of those two employees, Worthy and Burns, was an adverse action
16 and there is no question that
17 their union activity was not only a factor, it was *the* factor

18 in the Respondent's decision.

5 19 The offer of reinstatement if the employees
20 disavowed their action, whether that action be union activity
21 or protected concerted activity in which they have a statutory
10 22 right to engage, also violated the Act, in that
23 employees should not have to relinquish statutory rights in
24 order to maintain employment, or to reobtain employment.

15 25 That brings us to paragraph ten, with regard to applicant

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20 1 Lester Sheppard, who spoke with Buster Godbee
2
3 whose status as a supervisor is immaterial in view of
25 4 the evidence that he clearly was acting as an agent for the
5 purpose of hiring. Mr. Sheppard was referred to him
30 6 by Van den Bosch. Although Godbee
7 did not actually put Sheppard on the
8 payroll he promised a job
35 9 when he told him to show up with his tools the following
10 morning.

40 11 The next morning, Godbee observed Sheppard wearing his union shirt,
12 identifying himself as a member of Local 256. And the
13 transcript of their conversation is as follows.

45 14 Upon observing Mr. Sheppard, Mr. Godbee says, "Are you
15 in the Union." Sheppard: "Yeah, but they ain't got
16 much work for me right now." Godbee: "Oh, yeah, you should
17 have told me that." Sheppard: "Oh, yeah?" Godbee:

18 “Because I can't hire union guys, man.” That really is the end
19 of the conversation.

5 20 Pursuant to *FES*, 331 NLRB 9 (2000),
21 there is no question on the basis of the advertisements, as
10 22 well as the direction to report, that this Respondent was
23 hiring. With 20 years of experience, Mr. Sheppard was clearly
24 qualified. The animus of the Respondent with regard to the
15 25 Union is more than amply established upon this record, and I

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20 1 find that the appearance of Mr. Sheppard, on the day that he
2 was to start work identifying himself as a member of the
3 Union, a fact that he verbally confirmed to Mr. Godbee, was the
25 4 motivating reason for the Respondent's refusal to put him to
5 work.

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8 That concludes my decision.

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APPENDIX B

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board had found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT discharge you or refuse to hire employee applicants because of your membership in or activities on behalf of Carpenters Local 256, any local union affiliated with Southeastern Carpenters Regional Council, or any other labor organization.

WE WILL NOT threaten any of you with legal action in retaliation for your engaging in activities protected by Section 7 of the Act.

WE WILL NOT interrogate you regarding your participation in union activities and protected concerted activities.

WE WILL NOT condition your reinstatement upon disavowal of your protected Section 7 activities.

WE WILL, within 14 days of the Board's Order, offer John Worthy and Renard Burns full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days of the Board's Order, offer Lester N. Sheppard reinstatement to the position for which he applied, or, if that position no longer exist, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges to which he would have been entitled if the Respondent had not discriminated against him.

WE WILL make whole John Worthy, Renard Burns, and Lester N. Sheppard for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

WE WILL, within 14 days of the Board's Order, remove from our files any reference to the unlawful discharges of John Worthy and Renard Burns and failure to hire Lester N. Sheppard, and, within 3 days thereafter, notify them in writing that this has been done and that our unlawful actions will not be used against them in any way.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

5 MADISON BOSCH CONSTRUCTION, LLC
(Employer)

10 Dated _____ By _____
(Representative) (Title)

15 The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.
233 Peachtree Street NE, Harris Tower, Suite 1000, Atlanta, Georgia 30303-1531
404-331-2896, Hours: 8 a.m. to 4:30 p.m.

20 THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (404) 331-2877

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APPENDIX C

Page	Line	Delete	Insert
75	20	rules and regulations	The Board's Rules and Regulations
	21	Administrative Law Judges	administrative law judges
	22	and	
	23-24	rules and regulations	Rules and Regulations Section
76	1	contain also	also contain
	5	regards	regard
	5	in this decision--	
	7	employer the	employer. The
	10	union status	Union's status
	11	organizer Gibbs	Organizer Jimmy Gibbs
	12	union is an entity	Union is an organization
	14	employment,	employment and
	15	permitted and do participate and	permitted to and do participate. I
	16	union	Union
	17	The record reflects the	The
	18	received as	was received by the Respondent
	18	a certified receipt by the	a signed certified receipt.
	19	Respondent	Receipt
	22	quote at ... designated.	"at ...designated."
	23	order	Notice
	24	at this the courtroom I	this location, Courtroom I,
77	1	serving	service
	2	and a subpoena ad testificandum	
	3	Respondent the	Respondent. The
	4-5	thereof, confirms	confirm
	7	to my mind,	
	9	in fact subpoenas,	subpoenas,
	12	Mr.	Buster
	13	statements, relevant statements	statements
	15	Mr.	President
	17	lawsuits	lawsuits,
	18	protective activity Mr.	protected activity. Employee John
	19	he noted that he'd	Van den Bosch noted that he had
	20	cards	union authorization cards
	23	with regard to	in retaliation for
78	3	testimony	testimony,
	5	union	Union
	7	union	Union
	8	is	are
	10-11	but that's really immaterial,	
	11	union	Union
	16	learning on	upon learning
	17	them	those employees
	18	Whether I find that in	Even if
	19	fact ... and [the entire line]	
	20	even if it were not	his action was not

	Page	Line	Delete	Insert
		23	would be	are
		24	even if in fact we had no	Even if there was no
5	79	1	because the	because of the
		2	reflect	reflecting
		3	union	Union
		4	Relative to Wrightline,	Applying the Wright Line analysis,
10		7	two, the Respondent	second, the Respondent's
		12	the	
		14	Relative ... the	The
		15	employees	employees,
		16	but that it not only was--	
15		17	it was the factor	it was <i>the</i> factor
		19	reinstatement, if the employees were	reinstatement if the employees
		21	activities, which	activity in which
		22	engage in, obviously	engage,
20		23	rights,	rights
		24	employment,	employment
		25	Mr.	applicant
80		1-2	Lester Sheppard ... strike that [delete lines 1 and 2]	Lester Sheppard, who spoke with Buster Godbee
25		3	Whose	whose
		5	In that,	
		6-8	by Mr. Van den Bosch ... hired him [delete lines 6-8]	by Van den Bosch. Although Godbee did not actually put Sheppard on the payroll, he promised a job
30		11	At that point, he observed him	The next morning, Godbee observed Sheppard
		14	says, are	says, "Are
		15	union. Mr. Sheppard says, yeah,	Union." Sheppard: "Yeah,
		16	now. Mr. Godbee, oh,	now." Godbee: "Oh,
35		17	that. Mr. Sheppard, oh, yeah? Mr. Godbee	that." Sheppard: "Oh, yeah?" Godbee:
		18	because I can't hire union guys, man.	"Because I can't hire Union guys, man."
40		19-20	of the conversation, ... FES, [delete lines 19 and 20]	of the conversation. Pursuant to <i>FES</i> , 331 NLRB 9 (2000),
		23	hiring with	hiring. With
		25	union	Union
81		3	union	Union
		3	Godbee	Godbee,
45		6-7	Off the record. [Delete lines 6-7]	